IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 366 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE KUNDAN SINGH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ADANI EXPORTS LTD

Versus

ORIENTAL INSURANCE CO LTD

Appearance:

MR KAMAL B TRIVEDFI for
M/S TRIVEDI & GUPTA for Petitioners
MR SHASHIKANT S GADE for Respondent No. 1

CORAM : MR.JUSTICE KUNDAN SINGH

Date of decision: 09/04/2001

ORAL JUDGEMENT

Heard the learned counsel for the parties.
Perused the relevant materials on record.

2. This petition has been filed for declaring that in the absence of any agreement between the parties as

regards the payment of 'vessel's overage extra' it is not permissible to the respondent company to demand the said extra overage premium from the petitioner company while setting its claim under the two marine policies in question and for a direction to the respondent company to pay full amount of claim demanded by the petitioner from the respondent company under two marine policies in question and for permanently prohibiting respondent company from seeking to recover any amount of average extra premium from the petitioner company while releasing due payment in favour of the petitioner company and for quashing and setting aside the communication dated 15-5-2000 to the extent to overage extra amount is sought to be recovered from the petitioner company as being of violative of Articles 14, 19 (1) (g) and 300A of the Constitution.

3. The petitioner imported edible quantity of 12000 MT of White Sugar per vessel called M.V. Paulina from China (Hauangpu) to India. The total value of the consignment was Rs.12.75 crores. The entire consignment was duly insured for the sum of Rs.12.75 crores with total premium amount of Rs.2,30,751/- under two insurance policies. On arrival of the consignment the necessary survey was shown. The petitioner lodged the claim with the respondent company for a sum of Rs.5,43,500/- under the coverage of aforesaid two insurance policies as per the claim bill dated 24-3-2000. The respondent company sanctioned the claim of the petitioner under two insurance policies for the amount of Rs.4,10,243/-. The respondent company under the guise of sanctioning two claims of the petitioners, came out with demand of Rs.3,06,945 (7,11,188/- overage extra) Rs.4,10,243/total claim settled under survey fees against the petitioner. The petitioner protested the arbitrary claim of overage extra by the letter dated 17-5-2000 that such overage extra cannot be charged as there was no term in the contract. The contention of the learned counsel for the petitioner is that the respondent company has settled the claim amount for Rs.4,10,243/- including the amount of claim of Rs.3,99,500/- and survey fee as Rs.10,743/-. In para 6 of the petition the procedure regarding concept of insurance, insurance policy, overage extra etc. is mentioned. As per Section 3 of the Marine Insurance Act, 1953, a contract of marine insurance is an agreement, whereby the insurer undertakes to indemnify the assured, in the manner and to the extent thereby agreed, against marine losses covering loses incidental to marine adventure. By virtue of Section 4 of the said Act, a contract of marine insurance can also be extended so as to protect the assured against the losses of inland

waters or by any land risk which may be incidental to any sea voyage and a contract of marine is to be concluded when the proposal of the assured is accepted by the insurer upon the issuance of the policy and for the purpose of showing when the proposal was accepted with reference to the cover note or customary memorandum. What is mentioned in the policy document and/or in any accompanying document attached therewith are the terms and conditions of the marine contract arrived at by and between the insurer and the assured and the same is conclusive for all practical purposes. Any unilateral interpretation, deviation, addition introduction or inference relating to any new term and condition in respect of which there was no agreement between the parties at any point of time at the time of entering into said marine contract, would not be applicable to the parties. While settling the claim of the petitioner, the amount to be recovered under the guise and false protest of overage extra, the respondent company did not care to explain as to on what basis the said amount has been worked out which it was not within the knowledge or information of the petitioner. Since, the issue of "vessel overage extra" was not in the picture at the time of entering into contract of marine insurance, in respect of two insurance policies. Hence, the respondent company cannot claim such overage extra which was never agreed upon between the parties. It is also stated that the loss is admitted by the respondent company and the survey is conducted by the approved surveyor nominated by the respondent company and hence the respondent company cannot deny investigation of such thing. It is also submitted that overage extra has been charged at the rate of 0.56 to 50% on the total type of vessel cargo. Nothing has been stated as to on what basis amount of overage extra has been charged and overage extra is arbitrary. Hence the said amount cannot be recovered from the petitioner.

4. The affidavit-in-reply has been filed by the respondent Company. It is also stated that it is admittedly in the present case the provisions of overage extra are applicable. Extra premium on account of average of the vessel is legal right of respondent company. Because respondent company as being State is strictly following Public Policy and cannot by any stretch of imagination waste public money. This is hidden condition looking to the General Principle of law and the petitioners cannot say any adverse in this regard. The petitioners are not allowed to raise issue that at the time of transaction of the policies in question or thereafter till the point of time of

settlement of the claim of the petitioners. In para 10 of the affidavit-in-reply it is stated that this condition is hidden in the contract and it should be made applicable judiciously which respondent has adhere to.

5. The contention of the learned counsel for the respondent is that the petition is not maintainable as an alternative remedy is available to the petitioners by way of filing claim suit in the Civil Court or before the appropriate forum and without exhausting alternative remedy the petition is not maintainable in the eye of law.

6. So far as the contention of the learned counsel for the respondent regarding alternative remedy available to the petitioner is concerned, it is a discretionary power to entertain or not to entertain the writ petition and in case the writ petition can be entertained even though the statutory alternative remedy is available to the party.

7. The Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others, reported in SCC 1998 (8) Page No. 1, has considered the concept of alternative remedy relying on the case of State of U.P. Vs. Mohammad Nooh, reported in AIR 1958 SC 58, wherein it has been held as under :

> "But this rule requiring the exhaustion of statutory remedies before the writ will be granted is a rule of policy, convenience and discretion rather than a rule of law and instances are numerous where a writ of certiorari has been issued in spite of the fact that the aggrieved party had other adequate legal remedies."

8. Another decision of the Constitutional Bench in the case of Calcutta Discount Co. Ltd. Vs. ITO, Companies Distt. P., wherein it has been held as under :

> "Though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts will issue appropriate orders or directions to prevent such

consequences. Writ of certiorari and prohibition can issue against the Income Tax Officer acting without jurisdiction under Section 34, Income-tax Act."

9. The Supreme Court has further held in the case of Whirlpool Corporation (supra) "That being so, the High Court was not justified in dismissing the writ petition at the initial stage without examining the contention that the show-cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "Tribunal".

10. The Supreme Court in the case of United India fire and General Insurance Co. Ltd. and others Vs. A.A. Nathan and another, reported in 1980 (1) LLJ Page 368, wherein it has been held that in a fit case, the High Court can exercise discretion of issuing the writs where the order is arbitrary or unreasonable.

11. The contention of the learned counsel for the petitioner is that the petitioner was not aware of the hidden condition otherwise the petitioner would have engaged another Insurance Company for this purpose. There is no express condition either in the policy itself or in any other document. Hence, such hidden condition cannot be accepted in respect of overage extra. In the facts and circumstances of the case, the claim amount of the petitioners has been settled by the respondent company as Rs.3,99,500/-, the respondent company cannot go behind that settlement. So far as the overage extra is concerned, no criteria has been shown either in the affidavit-in-reply filed on behalf of the respondent company or in any other documents filed by the respondent company. Hence, in absence of any terms and conditions such amount i.e. overage extra cannot be recovered from the petitioner company.

12. So far as the survey fee is concerned, the petitioners has claimed Rs.1,44,000/- against the respondent company and the respondent company has calculated that amount at Rs.10,743/- towards survey fee. According to the leaned counsel for the petitioner, the petitioner is entitled to reimbursement of that amount.

13. In the facts and circumstances, the amount which has been settled by the respondent - Insurance Company, the petitioner is entitled to that amount. Accordingly, the respondent - Insurance Company is directed to pay that amount of Rs.3,99,500/- to the petitioner. As there

is no terms and conditions either in the policy or in any other documents regarding overage extra charges that amount cannot be taken or charged from the petitioner by the respondent on the basis of hidden condition which is not a part of policies for which no notice was given to the petitioner at all.

14. Accordingly, this petition is allowed for quashing and setting aside the overage extra charge claimed by the respondent company from the petitioner company and respondent Insurance Company is directed to pay an amount of Rs.3,99,500/- within two months from today. So far as the survey fee is concerned, the petitioner would be at liberty to make a representation to the respondent company with regard to the claim of Rs.1,44,000/- and in case such representation is filed by the petitioner, the respondent company is directed to decide the same in accordance with law within a period of three months from the date of presentation of a certified copy of this order by either of the party.

15. With the above observations and directions, this petition stands disposed of. Notice is discharged with no order as to costs.

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/JVSatwara/